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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

17 UNITED STATES OF AMERICA,)
18) No. 9373-(WMB)-CD
Plaintiff,)
19 vs.) DEFENDANTS' MEMORANDUM ON THE
20 ANTHONY JOSEPH RUSSO, JR.,) MEANING OF THE TERM "NOT
DANIEL ELLSBERG,) LAWFULLY ENTITLED" AS USED IN
21) 18 U.S.C. 793(d) AND (e).
22 Defendants.)
23

24 The Court has inquired as to the meaning of "not entitled
25 to receive," to which the parties have tentatively addressed them-
26 selves: the government by seeking to incorporate Executive Order
27 10501 and implementing directives into the statute in its jury in-
28 structions and trial memorandum, and the defendants by referring to
29 the "permission of the owner" in their proposed jury instructions.
30 Upon further analysis and in light of the Court's discussions of the
31 problems during oral argument [Tr., June 7, 1972], we offer the
32 following summary of our position, followed by supporting

1 arguments.

2 1. Under the First Amendment, information required by
3 citizens to fulfill their responsibilities as citizens is
4 information to which they are entitled unless the government can
5 show an overriding national interest.

6 2. Since 18 U.S.C. 793 does not explicitly define the
7 phrase "not entitled to receive" its meaning should be drawn from
8 the statutory context. This context suggests that the phrase
9 refers to persons whom one has reason to believe would use national
10 defense information to the injury of the United States or to the
11 advantage of a foreign nation.

12 3. If material is in the public domain, then all citizens
13 are entitled to receive it. (Heine).

14 4. 18 U.S.C. 793 cannot be construed to authorize the
15 Executive Branch to determine entitlement, since the statute
16 contains neither a direction that the Executive establish rules
17 and regulations which have the effect of law, nor standards for
18 delegation for such lawmaking authority.

19 5. Even if §793 could be implemented by an Executive
20 Order, 10501 is not that order. It does not purport to be issued
21 under authority of §793 or to implement §793.

22 6. Even if 10501 could be viewed as attempting to set
23 standards for determining who is a person not entitled to receive,
24 the criteria set out in 10501 and its derivatives, particularly
25 when viewed in the context of ongoing practice, present standards
26 which are so inconsistent and imprecise as to furnish no clear
27 guidance.

28 7. If 10501 is nonetheless to be looked to for standards
29 then the document to which the standards are applied must be
30 properly classified under 10501 both as to procedural regularity
31 and substance.

32 8. If entitlement is to be determined by 10501, its

1 derivatives and practice, then a person not entitled to receive is
2 one who is either (1) not trustworthy or (2) whose possession would
3 harm the national defense."

4 9. Regardless of the standards accepted they must be
5 limited to government property.

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1 I. First Amendment Criteria

2 The First Amendment necessarily overrides all other bases
3 for determining entitlement. If the contents of the document in
4 question are of vital importance to the political discourse, and of
5 slight or no importance in terms of national defense security, then
6 the First Amendment requires that every American citizen be
7 considered entitled to receive it.^{1/} Thus, a history of the war
8 might marginally relate to national defense security, hence "relate
9 to national defense," yet be of such vital importance to public
10 understanding and ability to judge and vote on war issues and
11 candidates that, per force of the First Amendment, all American
12 citizens would be entitled to receive it. Compare New York Times
13 v. Sullivan, 376 U.S. 254 (1964), in which the Supreme Court
14 declared that even libellous publications were protected by the
15 First Amendment because of the tremendous premium placed on the
16 importance of public discourse on political issues and political
17 figures. Such communication is protected, it should be noted,
18 unless it is coupled with actual malice -- i.e., a specific intent
19 to injure.

20 The First Amendment mandate favoring maximum
21 dissemination of information to the American public is reflected
22 in the Executive Order and regulations on classification, although
23 the policy is most honored in the breach.^{2/}

24 ^{1/} The argument here is similar to that made as part of defendants'
25 motion to dismiss, pertaining to overbreadth of the term "national
26 defense." It might be possible to save the statute from overbreadth
27 by incorporating this First Amendment component into the meaning of
28 "entitled to receive."

29 ^{2/} Executive Order 10501 begins: "Whereas it is essential that
30 the citizens of the United States be informed concerning the
31 activities of their government;...." DoD Regulation 5210.47
32 provides:

1 (2/ cont'd)

2 "Informing the Public

3 The Department of Defense, in accordance with the
4 policy of the United States Government, shall inform
5 the American public of the Activities of the Department
6 of Defense to the maximum extent consistent with the
7 best interests of national defense and security."

8 This regulation further provides:

9 "Misuse of Classification

10 Classification shall apply only to official infor-
11 mation requiring protection in the interests of
12 national defense. It may not be used for the
13 purpose of concealing administrative error or
14 inefficiency, to prevent personal or departmental
15 embarrassment, to influence competition or
16 independent initiative, or to prevent release of
17 official information which does not require
18 protection in the interests of national defense."

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1 II. Statutory Construction From Context

2 Sections 793(d) and (e) do not define "not entitled to
3 receive it." This lack of definition would normally invalidate a
4 criminal statute, particularly in the First Amendment area; a safe
5 exception might occur here if under the rule of United States v.
6 Rumely, 345 U.S. 41, the general standards in subsections (a), (b),
7 and (c) could be deemed to clarify the vague term "not entitled."
8 A standard which is a logical derivative from (a), (b), and (c), and
9 which passes the constitutional test referred to above in Section I
10 is one which defines the proscribed recipient as one whom the de-
11 liverer had reason to believe would injure the United States if he
12 had possession of the information. As Rumely does not permit the
13 interpolation of this standard, 793(d) and (e) are unconstitutional
14 for vagueness.

15 III. Public Domain Information

16 Information in the public domain is information to which
17 all citizens are entitled.

18 Thus, no one is a person "not entitled to receive" infor-
19 mation which is in the public domain regardless of how the informa-
20 tion reached the public domain or how the possessor of the informa-
21 tion obtained it. In United States v. Heine, 151 F.2d 813 (2d Cir.
22 1945), the Court noted that information could enter into the public
23 domain in a variety of ways; e.g., the Government never sought to
24 protect it, it is released in official reports, or "procured by a
25 magazine through interviews with officers." Id. at 816.

26 The Court made clear it was concerned not with the source
27 of reports, but whether the information in them was in the public
28 domain:

29 "Certainly it cannot be unlawful to
30 spread such information within the United
31 States; and, if so, it would be to the last
32 degree fatuous to forbid its transmission to

1 the citizens of a friendly foreign power. 'In-
2 formation relating to the national defense,'
3 whatever else it means, cannot therefore include
4 that kind of information, and so far as Heine's
5 reports contained it, they were not within the
6 section." Ibid. [emphasis supplied]

7 The Court's concern was with a "kind" of information and
8 not with how a particular possessor secured it.

9 The National Commission on Reform of Federal Criminal Laws
10 confirms this interpretation as follows:

11 "Heine makes it clear that the gist of ex-
12 pionage is that it covers only such information
13 which can aid an enemy as would not be available
14 to the enemy except for the conduct of a person
15 avoiding a restriction on communication or revela-
16 tion to the public." Id. at 452.

17 IV. Section 793 Does Not Authorize the Executive to Establish
18 Standards

19 Section 793 does not in terms purport to delegate to the
20 Executive Branch the authority to determine entitlement. In this
21 respect, it differs from 18 U.S.C. 795 (photographing and sketching
22 defense installations) which operates when "the President defines
23 certain vital military and naval installations or equipment as re-
24 quiring protection" and from the related processes of 18 U.S.C. 796,
25 797; it differs similarly from 18 U.S.C. 798 (disclosure of classi-
26 fied information) which defines both "classified information" and
27 "unauthorized persons" by referring to designations respectively to
28 be made "by a United States Government Agency" or "by the President,
29 or by the head of a Department or Agency of the United States Gov-
30 ernment which is expressly designated by the President..." Like-
31 wise, it differs from 18 U.S.C. 799 (violation of regulations of
32 National Aeronautics and Space Administration) which expressly makes

1 criminal the violation of "any regulation or order promulgated by
2 the Administrator of the National Aeronautics and Space Administra-
3 tion for the protection of any laboratory..."

4 On other laws, see, e.g., the Selective Service Act,
5 50 App. U.S.C. § 462(a), sought to be enforced in United States v.
6 Spock, 416 F.2d 165 (1st Cir. 1968).

7 In Greene v. McElroy, 316 U.S. 474, the Supreme Court re-
8 jected the Government's claim that its security clearance program
9 was authorized by statute. More recently, the Department of Defense
10 responded to Congressional inquiries: "There is no statute which
11 explicitly authorizes the Department of Defense to classify informa-
12 tion." 118 Cong. Rec. S. 8854 (June 6, 1972).

13 Even if 793(d) and (e) had authorized the President to
14 make regulations defining the term "not entitled" and other terms
15 used in the statute, the fact is that the statute would be invalid
16 because of the absence of standards necessary for a valid delegation
17 of power. See, Kent v. Dulles, 257 U.S. 116.

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1 V. E.O. 10501 does not purport to define entitlement.

2 If criminality is to be predicated upon violation of an
3 executive order implementing an existing statute the executive
4 order must be explicit and precise. Executive Order 10501 is
5 neither. //Its preamble states no intention to implement 18 U.S.C.
6 793. Indeed, it makes no reference to §793 or to criminal statutes
7 in general. Nowhere else in the Executive Order is there any
8 reference to establishing standards for implementing any part
9 of §793. This is in contrast, e.g., to E.O. 10104, 15 F.R. 597,
10 which expressly implements 18 U.S.C. 795 by defining the places and
11 objects protected by that criminal law.

12 The only reference to §793 is an instruction of what is
13 to be marked when "practical" on documents disseminated outside the
14 Executive Branch. This does not purport to establish standards of
15 entitlement.

16 VI. E.O. 10501 contains constitutionally insufficient standards.

17 Even if 10501 and its implementing directives are
18 construed as an effort to establish the meaning of "not entitled to
19 receive," they set forth standards which are so inconsistent and
20 imprecise as to provide no clear guidance. This vagueness is
21 exacerbated to an extreme degree by the administrative practice
22 under the order and regulations.

23 Executive Order 10501 contains only one brief sentence
24 on the general subject of who is to be given possession of
25 classified defense information:

26 "Knowledge or possession of classified defense
27 information shall be permitted only to persons
28 whose official duties require such access in the
29 interests of promoting national defense and only
30 if they have been deemed to be trustworthy."

31 (Sec. 7)

32 Relevant implementing directives agree only on the fact

1 that granting access to documents requires two findings by the
2 possessor of the documents -- one relating to whether the
3 individual is trustworthy and the other to whether giving him
4 possession would harm or aid the national defense. The criteria
5 are stated very differently in four of the relevant documents.^{3/}

6 Taken together with practice they fail to support the
7 government's contention in its proposed Jury Instructions (see
8 No. 26 and No. 38) that security classification and need to know in
9 connection with official duties are the clearly established and
10 sole criteria.

11 Trustworthy

12 The government contends that security clearance is the
13 sole criteria for determining whether a person is "trustworthy."
14 Executive Order 10501 itself makes no reference to security
15 clearances. Moreover in Section 15 it provides for access for
16 those engaged in historical research who are required only to be
17 trustworthy.

18 In practice many individuals are deemed to be "trust-
19 worthy" and are routinely given access to classified information
20 without security clearances. These include

- 21 1. Congressmen
- 22 2. Judges
- 23 3. Foreign Nationals
- 24 4. Scholars
- 25 5. Newspapermen

26 Need to Know

27 The government's proposed Jury Instruction refers to
28 "official duties requiring possession." Its Trial Memorandum
29 refers simply to a "need to know" as if this were a precise term
30 with a clear meaning. Such is not the case. Executive Order 10501
31 3/ E.O. 10501, DoD Directive 5200.1, the Industrial Security
32 Manual and the RAND Security Manual.

1 sets out two different criteria for "need to know": "official
2 duties require such access" or "performing functions in connection
3 with historical research projects." The RAND Security Manual
4 establishes a different criterion: "knowledge of such information
5 [is] in the interest of national defense."

6 The vagueness of the concept and its susceptibility to a
7 variety of different interpretations is illustrated by the Office of
8 the Secretary of Defense Administrative Instruction No. 8 (revised
9 April 1, 1963) which states:

10 "It is the policy of the Secretary of Defense
11 that the principle of 'need-to-know' be given
12 the strictest interpretation." (p. 10)

13 By contrast the RAND Security Manual implies that the
14 term should be interpreted liberally because RAND relies on a
15 "flexible research staff." The Manual provides that all "technical
16 and support personnel with appropriate clearances have a need-to-
17 know" for all secret information which is not specially controlled.
18 (p. 43)

19 The RAND Manual also makes reference to the widely
20 varying practices when it informs its staff that:

21 "Security practices that you may observe at
22 the Pentagon . . . are not to be confused with
23 what we can and cannot do at RAND." (p. 1)

24 In fact the term "need-to-know" is defined in a variety
25 of ways in practice. In general, once the first criterion --
26 "trustworthy" -- is established, need-to-know is interpreted very
27 broadly.

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1 VII. The Documents Must Be Properly Classified

2 If entitlement is to be defined by executive order, then
3 the government must establish that the executive order is properly
4 applicable in this instance. Gellhorn and Byse, Administrative Law,
5 112-113; Jaffe, Judicial Control of Administrative Action, 336-37,
6 339 (1965).

7 This means that the government must demonstrate the proce-
8 dural integrity of the classification judgment on which it is basing
9 its assertion of criminality. It must also demonstrate the substan-
10 tive applicability of the classification standards to the documents.

11 The Court may wish, at some later point, to receive addi-
12 tional briefs and hear argument on this point.

13 VIII. Untrustworthiness and Potential National Defense Injury Are
14 the Only Standards in Practice

15 If 10501 and its implementing directives are to be used to
16 find a single standard for determining who is a person not entitled
17 to receive information related to the national defense, that stan-
18 dard must be consistent with each of the relevant directives and
19 with common practice. Such a standard would assert that a person is
20 not entitled to receive if: (1) He is not trustworthy, or (2) His
21 access to the information would harm the national defense. Thus, a
22 person in possession of classified information would violate 793(d)
23 or (e) if he had reason to believe either (a) that the person to
24 whom he transferred the information was not trustworthy, or (b) that
25 transferring the information would harm the national defense. No
26 other single standard is consistent with the constitutional require-
27 ments of the First Amendment and the language and practice of E.O.
28 10501.

29 IX. Government Ownership

30 Entitlement to access and possession must necessarily flow
31 from the person or entity which holds the title to the item in
32 question or from one acting as that person's agent. Section 793

1 applies only to situations in which entitlement, or lack thereof,
2 flows from the government. It does not purport to control the dis-
3 semination of private information or property not within the govern-
4 ment's control. Likewise, it should be noted that the classifica-
5 tion system established by Executive Order 10501 does not apply to
6 privately owned material. Therefore, the statute is operative only
7 where the government is the owner of the material in question and
8 the government, by constitution, statute or otherwise has provided
9 clear criteria for determining who is not entitled to receive.

10 Respectfully submitted,

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